

[\*Murray v. Protection Technology\*](#), 92-ERA-27 (ALJ June 22, 1992)

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**U.S. Department of Labor**  
Office of Administrative Law Judges  
800 K Street, N.W.  
Washington, D.C 20001-8002

June 22, 1992

Case No.: 92-ERA-27

In the matter of

HARRY MURRAY  
Complainant

v.

PROTECTION TECHNOLOGY, A division of  
DAY & ZIMMERMAN, Inc.  
Respondent

Bruce L. Baldwin, Esq.  
For the Complainant

James A. Goodman, Esq.  
For the Respondent

Before: ROBERT S. AMERY  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This proceeding arose under the Energy Reorganization Act of 1974, as amended, 42 USC 5851, and its implementing regulations at 29 CFR Part 24. The case was initiated by a complaint filed on January 30, 1992 by Harry Murray, the

Complainant, with the regional Wage and Hour Division District Director of the U.S. Department of Labor alleging a violation of the Act, by his employer, the Respondent, Protection Technology (PTI). The matter was investigated by the District Director who made an initial determination that the alleged violation had occurred and so informed the Respondent. Thereafter, on March 5, 1992, the Respondent filed a timely request for a hearing. The hearing was held before me on May 7, 1992 at Philadelphia, PA. The main issues in the case are whether any violations of the Act and its implementing regulations have occurred and, if so, what action should be taken as a result of these violations.

At the outset of the hearing, the parties stipulated that, prior to January 1, 1992, the Respondent had received no reports from medical or psychological professionals indicating that the Complainant was mentally unstable or unfit for duty and the Complainant had never been found psychologically unfit for site access.

The Complainant testified that he is 23 years old and has a high school education. He went to work for the Respondent in October, 1987 and, except for a 10 month period when he was laid off, he worked there until January 7, 1992. He started as a construction security guard and later he became an armed guard at the Limerick Generating Station guarding the protected area around a nuclear power plant. He received considerable training on explosives, firearms, etc. and became an executive protection specialist. The Respondent, called PTI, is a security subcontractor for the Philadelphia Electric Co. (PECO), which is a licensee of the Nuclear Regulatory Commission (NRC).

The Complainant's duties as an armed guard included manning guard posts, patrolling around the perimeter and handling the search devices used to identify contraband and explosives. All persons entering the plant had to go through the search train.

The Complainant was discharged on January 7, 1992 for the stated reason that he had failed a psychological test the previous day. The Complainant had undergone similar psychological testing (the MMPI test) on three previous occasions, as passing such a test was a prerequisite to working as a security force member in the protected area and also in becoming an armed guard. One of the previous tests was administered to the Complainant by David Hamarich, a licensed psychologist.

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In the events leading up to his discharge, on January 1, 1992 the Complainant was on duty shortly before midnight at the plant's administrative exit near the administrative office and, through some glass walls, he could see the search train area at the administrative entrance. The search train here consisted of explosive detector devices, as well as x-ray machines and metal selector devices that workers had to go through to enter the plant. Each worker had to stand inside an explosive detector for a short period of time until the device, which can "sniff" or sense explosives, signaled that it either was or was not proper for the person to continue on through to the x-ray machine and metal detector. If the person is carrying anything or has anything in his pockets, this is then processed

through the x-ray machine, while the person goes through the metal detector, which is like the security devices people go through at airports. If the person and his belongings pass through all these devices successfully he is allowed to enter the plant.

On the evening of January 1, 1992 the Complainant was watching several plant workers who had entered into the explosive detector area, but then the entrance guard had asked them to go back out through the explosive detector and reprocess through because he had to close down the line to conduct other business elsewhere temporarily. As the Complainant watched the plant workers go back out through the explosive detectors, he noticed that one of them had left a bag on a tray at the x-ray machine. The Complainant phoned to the administrative search line and talked to a Corporal Jennings, who had just arrived there, and explained that a package had been left on an x-ray tray by a person who had not taken it back with him to reprocess inside the explosive detector. Cpl. Jennings told the Complainant he would visually search the package which would be sufficient and hung up. The Complainant thought that a visual search might not detect some types of explosives in the way that an explosive detector device could sense them, so he called the administrative office and explained the situation to Sgt. Gregory, who was in charge that night. Sgt. Gregory asked the Complainant if he should deny access to the plant worker. The Complainant said he wasn't sure, since the corporal had told him he would take care of the situation, yet a prescribed procedure was not being followed. The Complainant then saw the plant worker with the bag that had not reprocessed through the explosive detector get his badge and enter the plant, as Sgt. Gregory went over and talked to the security guards at the search train. Sgt. Gregory then

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told the Complainant that no procedures had been violated, because the worker's bag had been visually searched by Cpl. Jennings. The Complainant was still not satisfied, so later he called Sgt. Stitt and explained the situation to him, adding that he thought it might be a violation of procedures. Sgt. Stitt talked to some PECO security personnel and said they felt the situation was adequate, but the Complainant explained to Sgt. Stitt how it would have been possible for contraband to get inside the plant, so Sgt. Stitt told him to write up a statement on the incident.

The Complainant did so and finished it after midnight as he was ending his tour of duty. He handed the statement to Sgts. Stitt and Gregory. The Complainant then turned in his firearm and other equipment and was about to leave when Sgt. Gregory called to him. Thinking that Sgt. Gregory was displeased with him, the Complainant asked a coworker, who was a union representative, to accompany him. Sgt. Gregory told the Complainant that a portion of his statement, to the effect that Sgt. Gregory had allowed the worker to enter the plant, was incorrect because he, Sgt. Gregory, was unable to stop the person from entering the plant. The Complainant told Sgt. Gregory that he thought that Sgt. Gregory did have the ability to stop the worker from entering the plant at the time the Complainant phoned him. Sgt. Gregory disagreed and, after further discussion, told the Complainant "Murray, you have a problem," then he left.

The Complainant's next work day would have been Sunday, January 5, 1992, but on January 3, 1992 he received a phone call from the PTI main office secretary informing him that he was under administrative suspension, that the training he had been scheduled for on January 5, 1992 was cancelled and that he was to come in on Monday, January 6, 1992. The Complainant did so and reported to the main office, again with a union representative. The secretary there informed him that he was to undergo a drug and alcohol test, as well as a psychological test. The Complainant was aware that if he refused to take the tests he could be fired, so he submitted and took the tests. Subsequently, he was informed that he had passed the drug and alcohol test. He also took a written MMPI psychological test that morning. As he waited at the office after the written test he saw a man, whom he later learned was a psychologist, go into an office with the site captain of Limerick Generating Station Captain Kester. About an hour later they came out of the office

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and then the psychologist called the Complainant in the office for an oral interview. About a half an hour after the oral interview, the psychologist informed the Complainant that, based on the test he had taken and the interviews with the site captain and the Complainant, he was going to declare the Complainant not recommended for site access and this meant the Complainant would no longer be able to enter the plant where he worked. The Complainant was told to come back on January 7, 1992 to see Capt. Kester. The Complainant did so, accompanied by another union representative, and Capt. Kester informed him that he was terminated for having failed an NRC required psychological examination. The Complainant asked for, but was unable to obtain, a copy of the psychological exam.

The Complainant testified that he had never before failed a psychological exam and he had never been treated for, or diagnosed as having, any mental illness, so, on his own, he obtained another MMPI psychological evaluation from Psychologist David Hamarich, who had tested him previously to enable him to obtain his firearm permit to become an armed guard. On January 13, 1992 Psychologist Hamarich tested the Complainant and later rendered a psychological evaluation.

The report, which was admitted in evidence as exhibit C-5, states in pertinent part:

"Summary and Recommendations: Mr. Harry Murray requested the psychological evaluation using measures similar to the objective personality measure that he took recently at work. On the Clinical Analysis Questionnaire there is no indication that Mr. Murray suffers from a major psychiatric illness.

"I am not aware of his specific work behavior that might have lead to his dismissal, but I do not believe that any job action can be taken against him based on his current state of mental health. This man has passed in the last several years multiple objective personality measures and has yet to ever once had his

psychiatric stability questioned. on examination today no indicators are outside the normal range.

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" By personality assessment Mr. Murray is rigid and overly compulsive. I do not believe that these are signs of significant difficulties, but rather within the normal range. I would strongly recommend if provisions exist for it, that Mr. Murray be reevaluated by the psychologist who found him unfit for duty. I believe that there is sufficient evidence to warrant reevaluation and possible probationary status rather than dismissal."

The Complainant also introduced evidence that a PTI guard mount announcement on January 2, 1992 signed by Capt. Kester provided that:

"When one officer is posted in the entry area and you must temporarily close the entry to process visitors, etc., ensure:

1. Any personnel that processed through the explosive detectors while you weren't observing process through again.
  2. All hand carried items must be processed through the explosive detectors again.
- Ex. C-6.

The Complainant testified that in January 1990, while he was laid off, he took and passed a civil service test for a local policeman's position, as well as a polygraph test and psychological evaluation and he was accepted, but did not take the job, because he was then recalled to work at Limerick Generating Station at better pay. The Complainant said he collected newspaper clippings of articles about policemen, including articles about police corruption, because he hoped someday to be in a position of training law enforcement or security officers and these clippings could explain how other policemen had made mistakes that should be avoided. He pointed out that in the PTI training office there were a number of such news clippings posted. He stated that he did not dislike persons in positions of authority and he did not trust his superiors anymore or any less than anyone else. He said he knew that at work he was required to follow his supervisors, orders, however, in his job at PTI any security officer is allowed to question a security supervisor's orders if he believes that prescribed procedures are possibly being violated. The Complainant is a member of a union, the United Plant Guard Workers of America, but his supervisors, as members of management, are not members of the union.

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PTI encourages its employees to make suggestions and complaints and the Complainant has made a number of these during his employment at PTI, including comments on the handling of disciplinary action against other members of his union and how some plant procedures were outdated or confusing. He was not the only union member who made complaints and suggestions. He made a complaint or comment about repairs to be made on guard shacks and Capt. Kester replied that the repairs were being

made when weather permitted. Ex. C-7. He made a suggestion on a PTI policy about wearing hard hats in the protected area and Capt. Kester noted this and commented, "I have read your suggestions on other subjects and appreciate you taking the time to write them. Thank you." Ex. C-8. On another occasion the Complainant received a note of appreciation for discovering a high radiation door key that had been left unattended and he acknowledged receipt of the note by stating, "It was a pleasure dinging the H.P. department." The Complainant explained that he wrote this "tongue in cheek" because his security department and the health physics (H.P.) department had a rivalry about catching each other making mistakes. However, the Complainant's supervisor wrote on the form, "A/G Murray performed his duties exceptionally well, but (according to his comment) for the wrong reason." Ex. C-9.

On another complaint form the Complainant asked questions about shaded safety glasses, the age of the bullet resistant vests and pistols being used and whether PTI was complying with state and federal requirements for lunch breaks. He also asked, "...if an individual makes a comment concerning suicide or some other emotional/psychological problem does PTI have a guideline on how to handle this situation, and does it make sense to punish or suspend an individual (without pay) when they are feeling down? Wont this just cause them to become even more depressed and possibly cause a fear of losing their job which may cause that person to give up hope and actually kill themselves? I feel PTI used extremely poor judgement." Ex. C-10. The Complainant explained that the reason he asked this question about suicide was because a co-worker friend of his was suspended from work due to a comment he made about shooting himself. The Complainant said he was not referring to himself in any way.

Another complaint filed by the Complainant involved a situation where a sergeant had listed him as being "off" instead of "sick" on the payroll roster, so he was not paid for a sick day and he would lose interest on the money. He then added,

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"... It's stupid bullshit like this that destroys morale. In the future, when I call off, I will call the desk sergeant, the EIO corporal who has the payroll sheets, the payroll at the PPC, and a union member, to make sure it's done correct (the payroll sheet). All in all a big unhappy face for management."

The Complainant had then drawn a picture of an unhappy face. Capt. Kester replied to this by stating that the Complainant would have his sympathy except for the tone he used in his complaint. The Captain stated he would personally see that the Complainant was reimbursed if he documented the amount he had lost. Capt. Kester added, "Hold your inflammatory comments to yourself, however, as they don't do either one of us any good and inane diatribes do disgust all concerned." Ex. C-11.

In yet another written complaint the Complainant asked why security force members who cannot pass through a portal monitor (due to nuclear tests or medicine) cannot work, inasmuch as there are a number of guard posts that do not require entering a radiation

area block where they could work. He also asked about a PTI policy in which police officers would not have to undergo the same search requirements as an armed guard would when entering the plant or when being escorted and he commented, "why are police officers more trustworthy than armed guards? ... there are numerous accounts of police officers who steal, commit homicide and other crimes. I know because I cut out articles of police corruption. Why are armed guards not given the same respect or police officers considered human beings who are capable of wrongdoing." The Complainant also added a note to Capt. Kester who had previously stated that the Complainant's comments might show he was not taking pride in his work as he had filed numerous complaints and he should appreciate his free speech. The Complainant wrote, "P.S. Dear Captain Kester: I do take pride in my work, and in my position as an armed guard and I do appreciate my ability of free speech. However, if PTI is going to have a, question, comment and complaint sheet, they should appreciate people expressing their opinions so that problems can be solved. Thank you very much." Ex. C-12.

The Complainant stated that his superiors always accepted his written complaints and passed them on to upper management to answer, but he was told he filed too many comments, and complaints. In November, 1991, at the Complainants request, he

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had two discussions with Capt. Kester about two of his complaints. (Exs. C-11 and C-12, *supra*) and another matter on November 27, 1991 concerning whether a certain alarm on his post was turned off or on and a mistake made by a radio operator, Corporal Chandler, who had notified the Complainant about the alarm. The corporal called the Complainant a "Jerk" and the Complainant was going to write up a statement on the incident and asked for a meeting with higher management, but the corporal apologized and the Complainant was ready to drop the matter, nevertheless Sgt. Gregory, who was nearby, had notified Capt. Kester who had a talk with the Complainant. The captain told the Complainant that he had a poor attitude and had filed numerous complaints, but the Complainant said he had to follow procedures and if a procedure was not being followed he would question it. The Complainant did not consider this a counseling session, because he had not received written notice of a counseling and he did not think he was being disciplined for any reason.

Another incident occurred in December, 1991 when the Complainant was on duty patrolling the perimeter and he noticed that one of the security cameras was pointing upwards to the sky, which was inappropriate. The Complainant notified a radio operator, Cpl. Jennings, of this twice. The Corporal replied that it was none of his business where the camera was pointing and to continue his rounds. Eventually Cpl. Jennings brought the camera down into the proper position and the Complainant continued his rounds.

On another occasion the Complainant had completed his foot patrol round and went to the break room to eat his lunch when he received a phone call from Cpl. Jennings who told the Complainant to respond to an alarm. Since usually foot patrol guards do not



answer alarms and there are other guards, called responders, whose main duty is to respond to alarms, the Complainant asked where the regular responder was. Cpl. Jennings did not answer the Complainant's questions, he just told him to go answer the alarm, so finally the Complainant did answer the alarm.

The Complainant said he has never been required to undergo disciplinary counseling, and prior to January 1, 1992 there were no negative reports or complaints against him in his personnel file. Prior to January 1, 1992 the Complainant was not aware that any supervisor had ever suggested that he was a security risk. To the best of his knowledge he has never broken any of

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the rules and procedures that he was working under with PTI.

The Complainant was aware that PTI had an Employee Assistance Program in which an employee can get treatment or help for personal, mental health, or substance abuse problems as a part of the company's fitness for duty policy. No one ever suggested that the Complainant might seek help under the Employee Assistance Program and this was not offered to him.

The Complainant is presently unemployed, although he has been looking for work with several local police departments and the state police. He is unable to work elsewhere in the field of nuclear security because of his termination from employment at PTI which goes on what he called a blacklist, circulated by the NRC. He is presently drawing unemployment compensation.

Phillip Beaver, an alternate union shop steward, corroborated the Complainant's testimony as to what happened when Sgt. Gregory called the Complainant in on the night of January 1-2, 1992. He described Sgt. Gregory as being upset while the Complainant spoke calmly.

Robert C. Gill, security branch head at Limerick Generating Station for PECO, testified that he is responsible for the security program at Limerick Generating Station. He is an employee of PECO, not of PTI. He explained that the nuclear security program is required by 10 CFR Part 50, Nuclear Regulatory Commission regulations. These describe what is expected of a NRC licensee in the way of its nuclear security program. Each licensee has to develop a security plan which covers its facility. PECO is a NRC licensee and operates the Limerick Generating Station. Security at a nuclear site requires very specific procedures for the guidance of its security officers. Under the security program there are protected areas to be guarded and security officers are provided with specific duties on how to do that. Mr. Gill's job is to oversee the performance of PTI, whose employees actually perform the functions of a security organization. They control access to the plant, conduct patrols inside the plant and the management of PTI provides oversight of the other employees. A visitor to the site who has a valid need to enter must



be escorted by a security officer. People with unescorted access must first undergo a background investigation, and drug, alcohol and psychological testing. Armed guards at the site are high caliber individuals

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who are required to have extensive training, a background investigation, drug, alcohol and psychological tests and subsequent random testing and they are under constant scrutiny to make sure they are following prescribed procedures. Captain Kester heads the PTI operation at the Limerick site and Mr. Gill talks with him about the security of the site on a daily basis.

PECO, as an NRC licensee, is required to have a fitness for duty program as prescribed by the procedures set forth at 10 CFR Part 26. Ex. R-1. In addition to the initial screening, individuals granted unescorted access, such as armed guards, are subject to random testing at any time. Also, first line supervisors are required to keep their employees under continuous observation at work to see if they are exhibiting any unusual behavior or if they appear to be under the influence of drugs or alcohol on duty. When a supervisor observes unusual or aberrant behavior in an employee he can request a "for cause" psychological evaluation of the employee. A "for cause" psychological evaluation does not invariably lead to termination of the employee and in some cases the psychologist recommends the persons evaluated for site access and they are returned to work.

Mr. Gill recalled that, as usual,, he met with his security shift personnel, as well as PTI supervisors, on the morning of January 2, 1992. At that time a decision was made to announce an enhancement of procedures for processing all personnel and their belongings through the explosive detectors and a guard mount announcement (Ex. C-6) resulted. This was read at guard mount for a week, but did not result in a permanent change in the existing procedures, however. When reminded of the events that had occurred on the night of January 1, 1992 involving the plant worker who had been required to reprocess through the explosive detector while his bag had not, Mr. Gill stated that in his opinion this did not amount to a violation of security procedures, because Cpl. Jennings had visually inspected the bag and that is considered an adequate search.

On January 3, 1992 Mr. Gill met with Capt. Kester who presented him with some statements from supervisors about the Complainant and recommended that the Complainant receive a psychological evaluation. Mr. Gill concurred with the recommendation. As a result of the psychological evaluation PECO determined that the Complainant was no longer eligible for unescorted access at the site and Mr. Gill informed Capt. Kester of this.

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Mr. Gill testified that PECO openly promoted suggestions, complaints and concerns by its employees, as well as employees of the contractors that work at its facilities, and these are publicized around the plant in various forms. He said employees are often praised for making suggestions and recommendations. On one occasion Mr. Gill wrote a note of appreciation to the Complainant (and others) for his participation in an emergency planning drill in July, 1990 and making a suggestion on how to do it better. Ex. R-4.

According to Mr. Gill, there is no appeal process in the PECO procedures that the Complainant could have used to appeal his denial of site access. He said, however, that if PTI decided they would like to put the Complainant back to work within the protected area, PTI could state a case for that to PECO which would consider it and have the ultimate decision. There is a list in the company's computer system of all persons who have been denied access and if the person reapplies, his file can be checked and reevaluated. Mr. Gill admitted that the fitness for duty program required the licensee to have an Employee Assistance Program. He was aware that a recent change to 10 CFR 73.56 (e) since January, 1992 now requires that a licensee have a procedure for the review, at the request of the affected employee, of a denial or revocation by the licensee of unescorted access authorization of an employee of the licensee, contractor, or vendor which adversely affects employment. The procedure must provide that the employee be informed of the grounds for the denial and given an opportunity to provide additional relevant information for an objective review. Mr. Gill agreed that at the nuclear facility if a supervisor does not follow prescribed procedures, a guard who observes it should question it and follow up the inquiry through the chain of command if the guard does not receive what he considers to be a appropriate response.

Sgt. Louis Gregory testified that he is employed by PTI as sergeant of the guard for one of the shifts at Limerick Generating Station and has been employed there since 1984. He remembered the incident of January 1, to 2, 1992 in which the Complainant reported that a bag was in front of the x-ray machine which had not been put through the explosive detector under observation of a security officer. The sergeant was familiar with the orders for that post (Post #1) and he said that there was no violation of those orders in the situation as

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reported by the Complainant. The procedures do require that a handbag or hand carried object be passed through the x-ray machine, but they do not require the bag must go through the explosive detector. The sergeant felt that the statement the Complainant wrote on the incident that night did not accurately portray Sgt. Gregory's role because he did not have any opportunity to stop the person from entering the plant when the Complainant fully explained the situation to him and the Complainant did not tell Sgt. Gregory to stop the person. Instead he told Sgt. Gregory that Cpl. Jennings had said he was taking care of the matter and that satisfied Sgt. Gregory, who then confirmed with Cpl. Jennings what had happened.

Sgt. Gregory had received training under the fitness for duty program for supervisors on types of behavior changes or potentially aberrant behavior in employees, such as: more than usual supervision necessary, frequent or intense arguments, change in relationships with coworkers, supervisors and others, expressions of frustration or discontent, change in frequency or nature of complaints, complaints by coworkers, etc.

Sgt. Gregory recalled the incident on November 27, 1991 when the Complainant was arguing loudly with Cpl. Chandler and a Sgt. Canci and insisted upon talking to the senior PTI person on site. Sgt. Gregory then called for Capt. Kester who came there. Sgt. Gregory then told Capt. Kester that he had concerns about the Complainant's behavior for the past month or more. Capt. Kester asked the Complainant if he was having any personal problems and the Complainant replied that he was not and that he had settled the problem with the supervisors. Sgt. Gregory stated that he never took any actions to suppress or silence the Complainant's suggestions or complaints.

When Sgt. Gregory told the Complainant on the night of January 1, to 2, 1992 that he thought the Complainant had a problem, Sgt. Gregory had reference to the way the Complainant conducted himself toward supervisors that night and on previous occasions. According to Sgt. Gregory, that night he was given an answer by a corporal, two sergeants and, he believed, a PECO security representative. The matter took up the time of all these supervisors and the Complainant still found it necessary to write up a statement on the incident of a procedural violation rather than making an operational suggestion. On January 5, 1992 Sgt. Stitt asked Sgt. Gregory to write up a report about problems

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he had had with the Complainant and Sgt. Gregory did so. Sgt. Gregory has seen some complaints written up by the Complainant in the past and he thought that some of them were valid. Sgt. Gregory thought the Complainant exaggerated the importance of minor points at times and that on January 1, 1992 the Complainant was overly compulsive about security matters.

Sgt. Harold Steve testified that he is a PTI shift sergeant at Limerick Generating Station and has worked there since 1985. He said that PTI encourages its employees to make suggestions and complaints. The company has an "open door" policy so that employees can talk to their supervisors, including the captain, and even Mr. Gill of PECO has made it known that if anyone has a serious problem they can feel free to contact him. At each guard post there are forms that can be filled out for comments, suggestions or complaints that will be answered by supervisors. There is also an Ombudsman Policy for employees to call a number after they have exhausted their other grievance and complaint procedures. Sgt. Steve said he, himself, has made numerous suggestions, many of which have been approved. The Complainant submitted one asking whether one of the guard posts was going to be a 24 hour post, whether security force members were properly trained in the use of fire extinguishers and what is the policy for transporting people in

the back of vehicles. The response was that the post would not be manned, that no special training is needed for the fire extinguishers and no transporting on the back of vehicles was allowed. On another occasion the Complainant suggested making a parking space in front of the Admin. Building for vehicles while the guard is inspecting the warehouse and the supervisor replied that a special order was initiated to allow the guard vehicle to park in front of the warehouse. The Complainant had submitted several other questions and suggestions, all of which were answered by supervisors, sometimes with notes of appreciation. Exs. R11-16

Theodore Straub, Regional Director for PTI, testified that he had oversight and support responsibilities for Limerick and another power station. He had previously been site captain at Limerick. He said he was familiar with PTI's Employee Assistance Program and it was his understanding that PTI's program could not be applied in a way which overrides PECO's policy for site access.

Capt. Richard Kester testified that he is employed by PTI

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as site captain at Limerick Generating Station in charge of the contractor security force. He said that he and other supervisors are required by the fitness for duty program to recognize employees with a fitness for duty problem and assure that an employee with a problem that could pose a safety hazard to the public does not work at the nuclear power plant while the problem exists.

Capt. Kester said he had counseled the Complainant about a combination suggestion-complaint he had about one of the armed guards who took some radiation medicine and could not enter the monitors without setting them off. Capt. Kester explained that he had worked out a solution that both PTI and the guard were happy with and the Complainant said he was satisfied with the answer. At the time Capt. Kester advised the Complainant, who had not discussed the problem with his corporals or sergeants, to have more confidence in them, but the Complainant said that they wouldn't know the answer or wouldn't give him a correct answer. On another occasion, in November 1991, soon after the Complainant had put in his complaint about his loss of sick time and interest, Sgt. Gregory called Capt. Kester and told him the Complainant was having a problem with attitude and had asked to see the senior PTI person. Sgt. Gregory also said the Complainant may have a personal problem, "maybe he'll tell you, but he hasn't told me." Capt. Kester arrived and talked to the Complainant in the presence of the assistant regional director, Sgt. Gregory and the union shop steward and asked what it was all about. The complainant said it had all been worked out. Capt. Kester asked if the Complainant had any problem and the Complainant said he didn't have any. Capt. Kester asked if there was anything he could help the Complainant with, but he said there was not. Capt. Kester concluded the interview by saying. "If something occurs to you that you have a problem, we have all kinds of forums for complaints and suggestions, but a public

confrontation is not one of them. I want you to develop a rapport with your sergeants, your supervisors, and I think they will reciprocate."

On January 2, 1992 Sgt. Ray Stitt told Capt. Kester, "We've had a lot of problems with Harry Murray... I know you've tried to talk to him. We've all tried to talk to him. We tried to help him. It's not getting anywhere. We need to do something." Capt. Kester asked if this involved the incident of the night before and Sgt. Stitt replied, "Not really, that is not it. It's

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just that over the last year, there's been several things,.... a cumulative effect." Capt. Kester said that he would need some statements, to get him the facts and he would research it. The next morning Capt. Kester received several statements from Sgt. Stitt and other supervisors.

Sgt. Stitt wrote that the Complainant had been a good officer until a year ago, but that recently his attitude changed "like he was mad at the world" and was out to find every little possible problem that he could. He had arguments with corporals, including Cpl. Jennings, and Sgt. Stitt felt that because of the Complainant's bad attitude "he might possibly hurt somebody or he is going to get hurt due to his temper." Another supervisor, Anthony Tucci, in his statement mentioned the incident when the Complainant kept arguing with Cpl. Jennings about the camera that was not pointing where he thought it should be, another incident in which the Complainant had to be told over the radio three times that there were resets in certain zones, and the incident in which Cpl. Jennings told him to answer an alarm and the Complainant replied that a responder should be answering the alarm and he had to be told again to answer it. On another occasion, supervisor Tucci thought the Complainant had displayed "very rude and loud behavior" and a negative attitude toward his shift and fellow officers. According to Tucci, the Complainant "is either going to hurt someone on shift or himself with his negative attitude and his very short temper." Cpl. Pochuski recited an incident in which the Complainant said that a Cpl. Boettge had signed the Complainant in a few minutes late and he thought that the corporal had done this to harass him. Cpl. Pochuski and others present told the Complainant that this was not true, that he should not have a negative attitude and that he should work with his fellow shift workers and corporals as a team. Cpl. Jennings submitted two statements. In the first, he described the incident in which the had radioed to the Complainant to answer an alarm, the Complainant twice asked why he should do so, since he was not a responder, and Cpl. Jennings had to tell him to do it three times before the Complainant complied. In his second statement Cpl. Jennings described the out of position camera incident. Sgt. Gregory, in his statement, mentioned the incident in which the Complainant argued with Sgt. Canci and asked to talk to the senior PTI person on site. Sgt. Gregory had then called Capt. Kester, because in the previous month the Complainant had had several other altercations with supervisors in which the Complainant became loud and insistent.

Sgt. Gregory stated that the Complainant sometimes held lengthy conversations with supervisors over the radio, which was inappropriate. Sgt. Gregory thought the Complainant had a grudge against all supervisors or some severe personal problem and was trying to get attention. Even after Capt. Kester talked to him, the Complainant had altercations with supervisors and questioned their directives and truthfulness and implied that he felt supervision was out to get him. Sgt. Gregory mentioned the incident of January 1, to 2, 1992 in which the Complainant called Sgt. Gregory to question Cpl. Jennings, actions in visually searching the bag instead of having it go through the explosive detector. The Complainant was still not satisfied and called Sgt. Stitt after he had already talked with Sgt. Gregory and Cpl. Jennings about it. Sgt. Gregory stated that the Complainant has become overly compulsive about security matters and in finding fault with supervision. According to Sgt. Gregory, some of the Complainant's coworkers have said privately that they feel uncomfortable working with him because they think he is unstable and are afraid of what or how he will react during an emergency response situation. Supervisor Harold Boylan stated that, although the Complainant is often correct in his questioning of procedures, he seems to be obsessed with finding fault in his post orders and procedures and questioning the actions of his supervisors. This made Boylan question the Complainant's effectiveness during an emergency situation or in a team environment, such as on the response team. Boylan thought that if the Complainant would spend more time actually doing his job rather than trying to find fault in it and others he would probably be a fine armed guard, " however his deteriorating attitude and behavior have all but destroyed his credibility as a dependable and trustworthy security force member." Supervisor George Bobeck witnessed conflicts between the Complainant and supervision, using the radio for improper transmissions, having a hard time contacting him for alarm responses, habitually having a question every day and questioning the acts of other security force members. He concluded "These acts of conflict have seemingly worsened and may soon get out of hand." Cpl. Suseback stated that the Complainant constantly questioned the authority of his supervision and their ability to delegate that authority. He once was reluctant to answer an alarm when told to do so, asking if that was not the responders, job. Cpl. Suseback concluded that the Complainant does not trust his supervision "and on the flip side H. Murray cannot be trusted by his supervision." Ex. R-19.

Capt. Kester read all these statements and decided he needed a professional to evaluate the Complainant under the fitness for duty program. He made his recommendation for a psychological evaluation of the Complainant to Mr. Gill and showed him the supervisors' statements. On January 5, 1992 Capt. Kester wrote up a cover sheet stating that the Complainant had become:



- "1. Belligerent - Loses his temper when given constructive counseling or questioned by supervisors.
2. Paranoid - Seems to think everyone is "out to get him". Looks for ulterior motives in the most innocent conversations.
3. Petty and dogmatic on insignificant details in his daily assignments.
4. Argumentative with peers and supervisors.
5. Displays an attitude and asks questions that vary greatly from the norm for an officer with his experience."

Capt. Kester concluded, " I have decided that Mr. Murray should not work in a nuclear environment until he has been professionally evaluated for fitness for duty. He has been denied access to the Protected Area at Limerick Generating Station until resolution of the causes of his abnormal behavior." Ex. R-19.

On January 6, 1992 Psychologist Peter A. Kolson arrived and met with Capt. Kester before interviewing the Complainant. The supervisors' statements were made available to the psychologist who read at least some of them. Subsequently, Capt. Kester received a form letter from the PECO medical department signed by the psychologist informing him that the Complainant had been administered the MMPI test and as a result he was not recommended for unescorted access at this time. Ex. R-19. In the afternoon of that day Mr. Gill informed Capt. Kester that the Complainant had been not recommended for unescorted access. On January 7, 1992 Capt. Kester gave the Complainant a letter terminating his employment at PTI because "you do not meet the standards for plant access in accordance with Work Rule A-17." Ex. R-19.<sup>1</sup> The Complainant had previously acknowledged that he had read and understood the work rules. Ex. R-21.

Capt. Kester was familiar with the statement the

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Complainant had made on January 1, to 2, 1992 about a bag that did not go through the explosive detector and he said that in his opinion this was not a violation of the procedures. He said the guard mount announcement that was published the next day was an enhancement of the procedures, but it did not make a change in the regular procedures. Capt. Kester said he never told the Complainant to keep his complaints to himself or that he complained too much. The Captain said he took no actions to retaliate against the Complainant or to suppress or silence his suggestions and complainants.

The pertinent statute, the Energy Reorganization Act of 1974, 42 USC 5851, provides in part:

"(a) Discrimination against employee. No employer, including a Commission licensee, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment



because the employee (or any person acting pursuant to a request of the employee)-

- (1) Commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 USCA 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
- (2) testified or is about to testify in any such proceeding or;
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purpose of this chapter or the Atomic Energy Act of 1954, as amended."

It is the Respondent's contention that the Complainant did not engage in any activity that was protected under the Act, that his written statement of January 1, to 2, was merely an internal complaint, conveyed only to his supervisors employed by PTI, and thus this did not constitute activity protected by the Act, citing *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). However, the cited case is a Fifth Circuit case, while

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the events which give rise to this proceeding arose in the Third Circuit Court of Appeals region and other Circuit courts have interpreted this matter of internal complaints differently. *e.g. Consolidated Edison Co. of New York, Inc. v. Donovan*, 673 F.2d 61 (2d Cir.1982); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985) cert. den 106 S. ct. 3311(1986)

I find that the Complainant's written statement of January 1 to 2, 1992 of a procedural violation was an "action" specifically designed to carry out the safety and security purposes of the Energy Reorganization Act of 1974 and the Atomic Energy Act of 1954. Even though it was an internal report, rather than one filed with the NRC, the Act protects an employee who has participated in a proceeding *or in any other action* to carry out the purposes of the Act. The Complainant saw a handbag that did not go through the explosive detector with its owner and he reported it. Although the bag was visually inspected by Cpl. Jennings, a security force member, the Complainant knew that explosives could be disguised so that they might not be recognized in a visual inspection, also his training had taught him that visual inspection is to be used only when the explosive detectors are inoperable, so he continued to report what he believed to be a violation of required procedures to Sgts. Gregory and Stitt and wrote up his statement. Although several of the Respondent's witnesses testified that no violation of the regular procedures had occurred in the incident, it seems nonsensical to say that only persons have to go through the explosive detector and not their possessions, since any saboteur could easily avoid the security search by putting explosives in a bag rather than carrying them on this person. Also, the explosive detectors can "sniff" or sense explosives (nitrates) which may not always be seen or recognized visually. If a visual search is

always sufficient, there would be no reason to have explosive detectors at all. Furthermore, the guard mount announcement of January 2, 1992 (Ex. C-6) shows that the idea expressed in the Complainant's written statement was correct and this was an enhancement of the regular procedures in effect.

Within 24 hours of the time the Complainant wrote his statement, Sgt. Stitt told Capt. Kester that they needed to do something about the Complainant and Capt. Kester told him to collect statements from the other supervisors. Among the statements were some from Sgts. Stitt and Gregory, as well as Cpl. Jennings, all of whom were involved with the incident of

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January 1, to 2, 1992 described by the Complainant in his statement. These statements comprised what Capt. Kester referred to as a "standard termination package." It appears that the Complainant's statement of January 1, to 2, 1992 became the "straw that broke the camel's back" because he had previously managed to antagonize a number of his supervisors who were only too happy to provide Capt. Kester with statements to the effect that they thought the Complainant had a bad attitude toward his supervisors. However the only real examples the supervisors could give were that he made too many complaints, he sometimes talked too much on the radio, he argued with his supervisors, and he questioned an order. So far as the complaints are concerned, a number of the witnesses testified that PTI and PECO encouraged the making of complaints and the Complainant was even praised and complimented for some of his written complaints and suggestions. Talking on the radio a little too much does not seem to be a very serious offense and the instance most often cited by the supervisors was when Cpl. Jennings told him to investigate an alarm and the Complainant questioned it, since he knew there were usually responders whose job it was to do that, but when Cpl. Jennings repeated his order the Complainant complied. There is no evidence that he ever disobeyed the order of any supervisor. He did sometimes argue with them and questioned them which apparently exasperated them enough to cause them to write this up in their statements. Mr. Gill of PECO admitted that, at the nuclear facility, if a supervisor does not follow prescribed procedures, a guard who observes this should question it and follow up the inquiry through the chain of command if the guard does not receive what he considers to be an appropriate response. In the years since the Complainant was hired at PTI in 1987 until January 2, 1992, the supervisors, whose duty it was under the fitness for duty program, to promptly report any aberrant or unusual behavior in the guards under their supervision, never took any disciplinary action against the Complainant or reported any misconduct, poor performance of duty or unusual behavior on his part until they were asked to write statements about him on January 2, to 5, 1992.

The Respondent urges that the supervisors' statements were not retaliatory conduct under the Act, but that they amounted to merely supporting evidence for Capt. Kester's recommendation that the Complainant be referred to a psychologist. The evidence

showed that prior to January 2, 1992 no one within PTI had ever found the Complainant's behavior so unusual as to warrant a

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denial of plant access or a "for cause" psychological evaluation. Moreover, prior to January 1, 1992 there had not even been a single written report of allegedly aberrant behavior on the part of the Complainant, however there was evidence that if any supervisor had observed aberrant or unusual behavior of any employee the supervisor had a duty to report it immediately, yet none did. The Complainant's written statement made the night of January 1, to 2, 1992 was factual and appropriate and it could not be considered to constitute aberrant behavior. However, within a matter of hours from the time the Complainant made his statement the collection of supervisors' statements by Sgt. Stitt began and these contained several generalized comments, such as that the Complainant's strict adherence to security was "compulsive" and that he had a "bad attitude." In my opinion, being compulsive about security may be a desirable trait in a person charged with the duty of guarding a nuclear power plant from subversion or terrorist attack. Also, although the Complainant is somewhat immature and he should have been a little more courteous and deferential and not quite so antagonistic toward his supervisors, I believe that he was genuinely enthusiastically trying to do the best possible job that he could. In some ways, such as criticizing or questioning a supervisor's procedures, he seems to have irritated and antagonized the supervisors resulting in their statements characterizing him as having a "bad attitude." I believe that the Complainant did not actually have a bad attitude and that the supervisors' statements were collected for the purpose of making a "standard termination package" to be used to obtain a psychological evaluation of the Complainant on the basis of those statements as a pretext to obtain his discharge.

It is, of course possible that PTI was motivated to some degree by legitimate concerns about the Complainant's mental health, so that this can be considered a "dual motive" discharge case. It has been held that the standard of proof in a "dual motive" discharge is that the discharged employee must make a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. *Consolidated Edison Co. of New York, Inc. v. Donovan, supra*. In my opinion, the Complainant has done that in this case. Once this is established, the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Consolidated Edison Co. of New York, Inc. v. Donovan, supra*; *Mt. Health City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.

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Ct. 568 (1977). In my opinion, here the evidence showed that the primary motivating factor in PTI's decision to discharge the Complainant was his protected conduct in making his statement of January 1 to 2, 1992 because: he was suspended the next day

without explanation and without having displayed any aberrant behavior the night of January 1, to 2, 1992; from January 2, to 5, 1992 PTI's supervisors tried to gather all the evidence they could against the Complainant into what Capt. Kester called a "standard termination package;" and PTI used Psychologist Kolson's unsubstantiated conclusion of "not recommended for unescorted site access "as the reason to discharge the Complainant, despite the fact that PTI's own Employee Assistance Program stated that it is company policy to assist employees in seeking help to overcome mental health and other problems. The fact that PTI chose to take action to discharge the Complainant rather than to address the mental health problem suggested by the psychologist's conclusion implies that PTI's motive was to discharge the Complainant rather than having concerns about his mental health. As far as the dual motive problem is concerned, I believe that the Respondent would not have reached the same decision to try to discharge the Complainant in the absence of the protected conduct in this case.

As far as the psychological evaluation, itself, is concerned, there is no evidence as to how the result was obtained, upon what factors it was based, or what methods were used, nothing but the unsubstantiated conclusion that the Complainant was not recommended for unescorted access. There is evidence that Psychologist Kolson read at least some, if not all of the supervisors' statements and that, using normal methods, he talked with Capt. Kester, as well as the Complainant. On the other hand, there is evidence that the Complainant had taken and passed three psychological evaluations in the past and that, within a week from the time of Psychologist Kolson's test the Complainant took and passed another such test administered by Psychologist Hamarick who wrote up a report in some detail. The weight of the evidence does not indicate that the Complainant is psychologically unfit for his job.

The Respondent also argues that PTI cannot be ordered to reinstate the Complainant to his previous job, since PTI has no power to control access to the Limerick site. However, Mr. Gill of PECO testified that PECO would give due consideration to any

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action indicating that PTI would want to put the Complainant back to work within the protected area. Moreover, by a provision of the Act at 42 USC 5851 (b) (2) (B), Congress specifically empowered the Secretary of Labor to take affirmative action to abate any violation of the Act and reinstate the Complainant to his former position, among other remedies. See also *Ellis Fischell State Cancer Hospital v. Marshall*, 629 F.2d 563 (8th Cir. 1980); *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. (1983), In addition, the standards of the American Nuclear Society at Section 5.4.5.1 permit the grant of unescorted access after "a subsequent investigation is conducted and a determination made that the information about an employee is either untrue or that it is not applicable in determining reliability and trustworthiness of the individual. Ex. R-3. Also, the fitness for duty program in effect in January, 1992 had a provision by which workers whose fitness is questionable may be returned to duty after determined to be fit to safely and

competently perform their activities. 10 CFR 26.27 (b) (1) Ex. R-1. Therefore, it is possible for the Complainant to be requalified for unescorted site access.

Accordingly, I find that the Respondent's action in discharging the Complainant for his protected activity constituted a violation of the Act.

### **RECOMMENDED ORDER**

It is hereby recommended that the Respondent shall be ordered to:

1. Reinstate the Complainant to the position he held as an armed guard at the time he was discharged, as well as reinstate his seniority retroactively.
2. Reimburse the Complainant with all back wages he lost since his discharge together with all fringe benefits, including insurance, health and welfare, pension, holiday and vacation benefits, etc. However, the Respondent is entitled to a credit for the unemployment compensation benefits the Complainant has received.
3. Reimburse the Complainant for the psychological evaluation of January 13, 1992 that he obtained from David Hamarich.
4. Pay the Complainant's legal fees incurred in this case and reimburse the Complainant for any legal fees he has already paid to his counsel.

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5. Take action to expunge the Complainant's personnel file of any critical correspondence accruing from this case.
6. Accord the Respondent all rights and privileges that are accorded to all its other employees.

ROBERT S. AMERY  
Administrative Law Judge

RSA/yj

### **[ENDNOTES]**

<sup>1</sup> Work Rule Category A provides that the acts of misconduct listed or failure to fulfill or pass job qualifications are considered serious and could be grounds for immediate termination. Rule A-17 is "Failure to satisfy or pass weapons, physical or psychological requirements, tests or examinations, or any other conditional requirements for employment with PTI." EX. R-20.